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ABSTRACT

The United States Supreme Court in New York Times v. Sullivan (1964) extended the scope of protection provided to the press when covering public officials, requiring officials claiming libel by the press to prove "actual malice" (knowledge of falsity or reckless disregard of truth or falsity). The Alien and Sedition Acts of 1798 limited expression by critics of the Federalist administration of President John Adams. The Court has implied in recent years that if a challenge to the law had been brought, the founders of the Republic would have rejected federal government restrictions on seditious libel (speech overtly critical of the government). Despite such suggestions in cases like New York Times v. Sullivan, a review of the literature shows that it is more likely that the Court would have upheld the Alien and Sedition Acts. Three members of the Adams-era Court supported the statutes, and every justice was a Federalist appointee. Furthermore, the Court had upheld expression limits in other contexts, and state laws restricting speech enjoyed broad support. Justice Brennan's majority opinion in Sullivan, which suggested that the founders would have opposed seditious libel prosecutions, misread American history and begged the question presented to the Court. Brennan's approach also ignored the low value placed on expression by English common law, from which early American law borrowed heavily. The Court's 1964 declaration that the Alien and Sedition Acts were unconstitutional should have been based upon an analysis of the social functions of speech, not a misreading of history. (One hundred thirty-two notes are included.) (SG)

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NEW YORK TIMES V. SULLIVAN: A REASSESSMENT OF THE COURT'S ANALYSIS OF THE SEDITIOUS LIBEL DOCTRINE

by

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NEW YORK TIMES V. SULLIVAN: A REASSESSMENT OF THE COURT'S ANALYSIS OF THE SEDITIOUS LIBEL DOCTRINE

Twenty-five years ago, the Supreme Court announced a decision in New York Times v. Sullivan that rewrote the law of libel. In Sullivan, the Court extended the scope of protection provided to the press when covering public officials. The Court ruled that the law "prohibited a federal official from recovering damages for a defamatory falsehood related to his official conduct unless he proves that the statement was made with 'actual malice'--that is with knowledge that it was false or with reckless disregard of whether it was false or not."[1] In sweeping language, the Court asserted that there was a "profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials."[2] This reasoning was later extended to apply to press coverage of private citizens in the context of issues of public interest.[3]

As an expression of libertarian thinking, the Sullivan decision was greeted with acclaim. Constitutional theorist Alexander Meiklejohn called it "an occasion for dancing in the streets."[4] Thomas Emerson celebrated the

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[1]New York Times v. Sullivan, 376 U.S. 279-280 (1964).

[2]New York Times v. Sullivan, 376 U.S. 270 (1964).

[3]Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

[4]Quoted in Harry Kalven, "The New York Times Case: A Note on the 'Central Meaning of the First Amendment,'" 1964 Supreme Court Review: 221.

decision as a "landmark" because it "meant that the law of libel would be brought into conformity with the system of freedom of expression."[5] Alexander Bickel wrote that "The Sullivan decision was an important and novel decision of great consequence in the law of the First Amendment."[6] Rodney Smolla stated that Sullivan "revolutionized the American law of libel because in one sudden burst of federal judicial power, state libel laws were made subject to the strictures of the First Amendment, and, with that ruling, hundreds of years of evolving state libel laws were rendered obsolete."[7] As historian Norman Rosenberg notes, "Sullivan has inevitably come to dominate most recent considerations of defamation law."[8]

The libertarianism of the Sullivan decision, however, was largely based upon a reinterpretation of the history of libel law, especially the controversial doctrine of seditious libel. The crux of the opinion--the rationale for expanding constitutional protection in libel cases--is grounded in an analysis of history, and the formulation by the Court of a historical standard against which to measure the constitutionality of prevailing state libel laws.[9]

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[5]Thomas I. Emerson, The System of Freedom of Expression (New York: Vintage Books, 1970), p. 254.

[6]Alexander M. Bickel, The Morality of Consent (New Haven: Yale University Press, 1975), p. 57.

[7]Rodney A. Smolla, Suing the Press: Libel, the Media, and Power (New York: Oxford University Press, 1986), p. 27.

[8]Norman Rosenberg, "Taking a Look at 'The Distorted Shape of an Ugly Tree': Efforts at Policy Surgery on the Law of Libel During the Decade of the 1940s," Northern Kentucky Law Review 15 (1988): 12.

[9]Cf., Anthony Lewis, "New York Times v. Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,'" Columbia Law Review 83 (1983): 606-607.

This paper argues that the Court used an idealized history of the infamous Alien and Sedition Acts to justify its decision in Sullivan to expand First Amendment protection. The paper is divided into four sections. The first section discusses the Alien and Sedition Acts of 1798, drawing upon contemporary documents and the works of several historians. The second section analyzes the Court's use of history in Sullivan. The third section of the paper provides a critique of the Court's historical interpretation. The final section of the paper discusses the implications of the Court's libertarian legacy in light of criticisms of its historical interpretation in Sullivan.

The Origins of the Alien and Sedition Acts of 1798

Beginning in 1793 with Washington's famous Proclamation of Neutrality, the United States maintained a precarious impartiality in the war between England and Napoleon's France.[10] The situation was difficult because America had been allied with both belligerents in wars against the other within the past thirty years. While still British colonies, Americans had enthusiastically contributed to France's humiliations in the Seven Years' War (1757-1763). In addition, the French were strong allies of the colonies during the Revolution--indeed, in British eyes, the Revolutionary War was as much a French as a "colonial" victory. While neutrality seemed preferable

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[10]This background information has been collected from a variety of sources. Among the best are William Stinchcombe, The XYZ Affair (Westport, Conn.: Greenwood, 1980); Alexander DeConde, The Quasi-War: The Politics and Diplomacy of the Undeclared Naval War with France, 1797-1801 (New York: Scribner's Sons, 1966); Albert Bowman, The Struggle for Neutrality: Franco-American Diplomacy during the Federalist Era (Knoxville: University of Tennessee Press, 1974); Stephen Kurtz, The Presidency of John Adams (Philadelphia: University of Pennsylvania Press, 1957); and Page Smith, John Adams, 2 vols. (Garden City: Doubleday, 1962).

to siding with either nation, the result was to earn the enmity of both. France and England each suspected that America was in secret alliance with the other.

England first grew angry when America allowed the French navy to use American ports while conducting raids on British shipping in the West Indies. When "neutral" American vessels began to carry on a trade between the West Indies and France, the English were able to justify seizing American shipping. This aggression against America in 1794 briefly made war seem likely, but Jay's Treaty avoided military hostilities. This success, however, lead to increased French belligerence. The French Directory viewed Jay's Treaty as increasing American ties with England, and the French retaliated by initiating an aggressive campaign against American shipping. Washington responded by withdrawing pro-French American Ambassador James Monroe and replacing him with the well-known Francophobe, Charles Cotesworth Pinckney. The tension escalated when the French refused to recognize Pinckney, thereby severing diplomatic relations with the United States.

By the time news of the diplomatic snub reached the United States, John Adams had replaced Washington as President. Adams reacted by calling a special session of Congress. In a speech delivered on 16 May 1797, he urged Congress to prepare for war with France, although he opted to follow Washington's policy of continued negotiations. In an effort to repair relations with France, Adams sent a mission composed of John Marshall, Eldridge Gerry, and Ambassador Pinckney to negotiate. Meanwhile, Congress empowered Adams to raise 80,000 militia troops, fortify vulnerable American harbors, and build frigates to protect American shipping. The Federalists were careful, however, not to initiate actual military hostilities before diplomatic options had been exhausted.

The American emissaries arrived in France in September of 1797. Their initial attempt to negotiate with French Foreign Minister Talleyrand was rebuffed. Shortly thereafter, clandestine French agents offered to start negotiations if America would agree to certain preconditions. These preconditions would require the American government to assume financial responsibility for all claims made by her citizens against France, to finance a sizeable French loan, to apologize publicly for Adam's speech of 16 May, and to give 50,000 pounds to the French Directory as a bribe. Despite considerable pressure from the French, the American envoys refused to meet the conditions without first contacting the President. In a series of coded dispatches to Secretary of State Timothy Pickering, they detailed the French demands. While graphically discussing the French position on negotiations, they concluded by noting that they had promised not to disclose the names of the French agents.

Although written in October of 1797, it took months for the dispatches to reach the United States because few friendly ships risked crossing the Atlantic during the winter. Adams finally received the dispatches on 4 March 1798. He promptly notified Congress that war with France was imminent and called for more defensive measures, and on 23 March, he recalled the American mission to France. The opponents of Adams, led by Vice-President Thomas Jefferson, thought that his bellicose behavior was indefensible. They demanded that he give the emissaries' correspondence to Congress. On 3 April 1798, Adams obliged, withholding only the names of the French agents

whom he identified as W, X, Y, and Z.[11] The correspondence was soon made public and revelation of this distressing information shocked even those who already had been openly critical of France.[12] The letters dealt a stunning blow to the pro-French faction, which was unprepared for such blatant French venality.[13]

The American public reacted with outrage as the story spread.[14] Even in the South and other rural areas that had been sympathetic to the French, there was widespread public indignation. Some of this anger was channeled into symbolic gestures such as patriotic songs and slogans. Many Americans, for instance, switched from a colored to a plain black cockade to signify their independence. But a large part of this indignation was more than symbolic. Eligible males joined together to form volunteer militias, and in some towns women even formed exclusively female paramilitary organizations. In coastal towns, collections were taken to raise money to construct a navy. But

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[11]The French agents were Nicholas Hubbard, Jean Hotlinger, Pierre Bellamy, and Lucien Hauteval. Because W (Hubbard) was hardly mentioned in the dispatches, the incident became known as the XYZ Affair.

[12]See David Hackett Fischer, The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy (New York: Harper and Row, 1965), p. 53.

[13]Jefferson, for example, seems to have convinced himself that no news was good news. His personal correspondence reflects a belief that negotiations would repair relations with France. See Dumas Malone, Jefferson and the Ordeal of Liberty, vol. 3, Jefferson and His Times (Boston: Little, Brown, 1962), p. 394.

[14]The nature and extent of public outrage is documented by Thomas M. Rey, "'Not One Cent for Tribute': The Public Addresses and American Popular Reaction to the XYZ Affair, 1798-1799," Journal of the Early Republic 3 (Winter 1983): 389-412.

perhaps the greatest indicator of public hostility were the hundreds of local meetings throughout America. Such spontaneous meetings were used to formulate and debate resolutions supporting the federal government. Each resolution was, in turn, sent to President Adams. Between April 1798 and March 1799, nearly three hundred such addresses from all parts of the country arrived in Philadelphia. Taken together, these petitions suggest that Americans were unified in support of their government, outraged by the insulting French behavior, and willing to support military measures to deal with this threat. In the words of Rey, "in this rare instance of massive public support for the infant federal government, the American people demonstrated that they were in substantial agreement on Franco-American relations."[15]

Instead of using this unanimity to heal the nation, the Federalists aggressively exploited this opportunity to solidify their previously precarious hold on the government. The Federalists pursued a strategy of warning against French treachery while simultaneously launching a direct attack against the political opposition. Throughout their preparations for war with France, Adams and his allies attempted to portray the Republican opposition, especially Madison and Jefferson, as French sympathizers.[16] Because of their

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[15]Rey, p. 411.

[16]Although it adds clarity to this discussion, the use of the terms "Republicans" and "Federalists" in this manner is somewhat misleading. These terms suggest the presence of political parties in the contemporary sense and disguises the fact that seditious libel was one of the issues that led to the formation of parties. Although these parties do not meet William Nisbet Chamber's formal definition of parties as "formations that exhibit developing consciousness and ideology, continuing organization or structure, and active appeals to a substantial electorate"--party labels are used throughout as they do simplify the descriptions and accounts of the events.

long-standing sympathies toward our Revolutionary War ally, Jefferson and his colleagues were vulnerable to charges that they were a faction against the Constitution. Moreover, because of their commitment to a decentralized popular government, the Republicans were also vulnerable to criticism for resisting attempts by the national government to increase the capability of America to defend herself. Accordingly, the Republicans were depicted as the champions of French interests. It was argued that no Republican could be a true American.[17] Prominent opponents were identified for suspicion. Those suspected included Swiss-born Congressman Albert Gallatin of Pennsylvania, Irish Congressman Thomas Lyon of Vermont, and the French economist Du Pont de Nemours.[18] James Monroe was recalled as Ambassador to France because of his French sympathies, Edmund Randolph was forced to resign as Secretary of State, and Jefferson's presidential campaign was beset with charges questioning his loyalty.[19] At the same time, the Federalists built up George Washington to suggest that an attack on Federalism was an attack on the revered patriarch of the country. The thread tying all of these efforts together was the charge that the opposition was allied with the French against

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See William Nisbet Chambers, "Politics in the Early American Republic," Reviews in American History 1 (1973): 499-503.

[17]See John C. Miller, Crisis in Freedom: The Alien and Sedition Acts (Boston: Little, Brown, 1951), pp. 11-13.

[18]See Marshall Smelser, "The Jacobin Phrenzy: Federalism and the Menace of Liberty, Equality, and Fraternity," Review of Politics 13 (October 1951): 474.

[19]Randolph was forced to resign when confronted with a memo from the French Minister to the United States intimating that he was receiving payments from the French. Randolph resigned his position to prepare a defense, hopelessly botched the defense, and was forced from public life. See Irving Brant, "Edmund Randolph, Not Guilty!" William and Mary Quarterly, 3d ser., 7 (April 1950): 180-198.

the national interest. In a very short time, the previously innocuous Adams was transformed into a political hero. Even the Republicans admitted that the Federalists were in an ideal position to capitalize on these events. The staunchly Republican Philadelphia Aurora admitted to President Adams that "your friends consider, as a matter of triumph, the many addresses from different parts of the union approbating your conduct with respect to the French nation, and promising to support your future measures; while your enemies on the other hand, are for the same reason displeased."[20] In short, the Federalists effectively parlayed the tension with France into widespread public support for their policies.[21]

There was another important factor in the strategy of the Federalists. Although they exploited the events to their political advantage, they lived in desperate fear that their "well-intentioned" efforts would go for naught. The Federalists were particularly disturbed by vocal opposition to their policies. They believed that the people were easily misled and could be deceived into betraying the Union. In their minds, republican government could work only if administered by a ruling elite, people wealthy enough to be independent and talented enough to govern wisely and creatively. To the Federalists, the situation was clear and unambiguous. Since they were absolutely convinced that their policies were in the best interests of the nation, they saw any opposition as either misguided or self-serving. In the words of Fisher Ames, "to make a nation free, the crafty must be kept in awe,

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[20] Aurora, 11 June 1798, quoted in Rey, p. 406.

[21] See Miller, pp. 4-5.

and the violent in restraint."[22] In the eyes of the Federalists, the Republican press was libeling the government and turning the people against elected leaders.

The Federalists rejected the idea that widespread discussion might lead to better policy through the marketplace of ideas. Alexander Addison stated the Federalist position when he declared that "truth has but one side: and listening to error and falsehoods is indeed a strange way to discover truth."[23] Since the Federalists knew the truth, Addison concluded that public discussion was pointless. Furthermore, the Federalists believed that the search for truth might actually be dangerous as people could arrive at falsehoods. George Taylor warned that the people might be seduced into erroneous judgments "before the truth could arrive to detect and protect."[24] Falsehood, Taylor reasoned, "was light and volatile" and spread quickly whereas "truth was the child of experience, and the companion of time; she scarcely ever outstripped, and rarely kept pace" with falsehood.[25] Worse yet, the marketplace might be exploited by those with malevolent design. As James Iredell wrote, "a pen in the hand of an able and virtuous man may enlighten a whole nation," but the "same pen in the hands of a man equally able, but with vices as great as the other's virtues, may, by arts of sophistry

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[22]Fisher Ames, "Dangers of American Liberty," in Works of Fisher Ames with a Selection from His Speeches and Correspondence, vol. 2, ed. Seth Ames (1845; reprint, New York: Burt Franklin, 1971), p. 394.

[23]Alexander Addison, Reports of Cases in the County Courts of the Fifth Circuit, and in the High Court of Errors and Appeals, of the State of Pennsylvania (Washington: Colerick, 1800), p. 589.

[24]George Taylor, Virginia Report of 1799-1800 . . . (Richmond, 1850), p. 135.

[25]Taylor, p. 135.

easily attainable, and inflaming the passions of weak minds delude many into opinions the most dangerous, and conduct them to actions the most criminal."[26]

These concerns culminated in 1798 with the adoption of four distinct pieces of legislation intended to legislate national unity. The first was a law that increased the period of residence required for an alien to be eligible for citizenship from five to fourteen years.[27] The second was the Alien Friends Act which authorized the President to deport any and all aliens whom he regarded as "dangerous to the peace and safety of the United States."[28] It was a temporary measure that expired two years after its adoption. The third was entitled "An Act Respecting Alien Enemies" and has come to be known as the "Alien Act." It authorized the President to apprehend, restrain, secure, or deport any citizens of countries at war with the United States.[29] As adopted, it was a wartime measure which could be invoked by the President only during a real or threatened invasion or a congressionally declared war. The fourth, and most important of the laws, was the Sedition Act, comprised of four sections.[30] The first of these sections provided a mechanism for punishing any group of people who combined to oppose the law of the

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[26]James Iredell, Life and Correspondence of James Iredell, vol. 2, ed. Griffith J. McRee (New York: Appleton, 1857-1858), p. 564.

[27]See 1 United States Statutes at Large 566 (1798).

[28]1 United States Statutes at Large 570 (1798).

[29]See 1 United States Statutes at Large 577 (1798).

[30]See 1 United States Statutes at Large 596 (1798).

United States.[31] The fourth section was a sunset provision which limited the duration of the Act until 3 March 1801, the day before the inauguration of the next President of the United States.[32] The second and third sections carry the real force of the Sedition Act. The second section imposed penalties on any person that "shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing . . . (of) any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute."[33] Those found guilty of violating this mandate were to be "punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years."[34] The third section outlined the rights of any individual tried under the second section of the Sedition Act. It stipulated that any person prosecuted under this act for the writing or publishing of any libel aforesaid, would be allowed to use "the truth of the matter contained in the publication charged" as a defense.[35] The jury impaneled to hear the case would have the "right to determine the law and

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[31] 1 United States Statutes at Large 596 (1798).

[32] 1 United States Statutes at Large 596 (1798).

[33] 1 United States Statutes at Large 596 (1798).

[34] 1 United States Statutes at Large 596 (1798).

[35] 1 United States Statutes at Large 596 (1798).

the fact" under the direction of the court.[36] Under the Act, suggests Stevens, "a political party, a petitioner, or even a legislator who voted 'wrong' might have been fined and imprisoned."[37] It allowed the Federalists to prosecute all political dissent as criminal action.

The Federalists' justification for such regulation, as set forth by Representatives John Allen, Samuel Dana, and Robert Goodloe Harper in the congressional debates, was straightforward. John Allen of Connecticut began from the premise that "if ever it was a nation which requires a law of this kind, it is this."[38] In his mind, the problem was that "certain papers printed in this city and elsewhere . . . exist to overturn and ruin the Government by publishing the most shameless falsehoods against the Representatives of the people of all denominations."[39] Such publications were obviously against "genuine liberty" and the "welfare of the country," and therefore they ought "to be displaced."[40] It is important to remember that Allen is not alleging actual lies or misstatements, but rather he is complaining about "political" lies. By his reasoning, anyone who has the audacity to question the wisdom of the Federalists' policies is contradicting the truth and is therefore lying. This is apparent when one considers the type of evidence that Allen offers to prove his charges. He refers to a paragraph from the Aurora of 28 June 1798

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[36]1 United States Statutes at Large 596 (1798).

[37]John D. Stevens, "Congressional History of the 1798 Sedition Law," Journalism Quarterly 43 (Summer 1966): 247; and Miller, p. 75.

[38]Allen, Annals of Congress, 5 July 1798, p. 2094.

[39]Allen, pp. 2093-2094.

[40]Allen, p. 2094.

which states: "It is a curious fact, America is making war with France for not treating, at the very moment the Minister for Foreign Affairs fixes upon the very day for opening a negotiation with Mr. Gerry."[41] This was objectionable, Allen charged, for it gave the impression that the Federalists were warmongers. He cites a section from the Time Piece of New York calling Adams "a person without patriotism, without philosophy, without a taste for the fine arts, building his pretensions on a gross and indigested compilation of statutes and precedents."[42] He indicts the Aurora for questioning "whether there is more safety and liberty to be enjoyed at Constantinople or Philadelphia?"[43] Allen is not arguing that these statements should be suppressed because they are false from an objective perspective. Rather, he is arguing that their "intention is to swell the ranks of our foes."[44] He admits as much when he claims that the Republicans are using the press as a weapon against the Federalists and that the Federalists must "wrest it from them."[45]

Robert Goodloe Harper offered a different justification for the Sedition Act. He was not so much concerned about the press as he was about Republican legislators. In his mind, the real danger was from speakers "whose character and connexions gave him weight with the people, pronouncing an invective against the Government, and calling upon the

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[41]Allen, p. 2094.

[42]Allen, p. 2097.

[43]Allen, p. 2096.

[44]Allen, p. 2099.

[45]Allen, p. 2098.

people to rise against the law."[46] Such speech "may have a very different effect from the filthy streams of certain newspapers" as it may actually "gain credit with the community, and produce consequences which all former abuse has failed to do."[47] Nor was such evil confined to speeches given before the Congress. Harper charged that letters questioning national policy had been circulated by prominent Republicans. Since such expression would inevitably lead to terrible consequences, Harper concluded that the government was justified in punishing "treasonable and seditious writings."[48]

Samuel Dana labeled those who dared to oppose the Sedition Act as "apostles of insurrection."[49] He argued that the bill had only two objectives: "to punish conspiracies and calumnies against the Government."[50] That these objectives were commendable could not be denied: hence, opposition to the bill was dismissed on the grounds that it was either misguided or self-serving. Appeals to freedom of speech were erroneous claims, Dana reasoned, because free speech is not "anything more than the right of uttering and doing what is not injurious to others."[51]

While other Federalists spoke in favor of the Sedition Act, it is not necessary to chronicle their arguments. Every Federalist who spoke during

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[46]Harper, Annals of Congress, 5 July 1798, pp. 2102-2103.

[47]Harper, 5 July 1798, p. 2103.

[48]Harper, 5 July 1798, p. 2103.

[49]Samuel Dana, Annals of Congress, 5 July 1798, p. 2112.

[50]Dana, p. 2112.

[51]Dana, p. 2112.

the Congressional debates defended the desirability of the Sedition Act, although John Marshall privately questioned its constitutionality.[52] The Federalists defended the Sedition Act as a necessary measure to protect the national interest during a time of crisis. Their understanding of the national interest, however, was synonymous with their own policies. The Sedition Act was not intended to suppress a few dissidents or outcasts. On the contrary, it was expressly designed to suppress *any and all* political opposition to Federalist leadership and policies. As the arguments offered in defense of the Sedition Act clearly demonstrate, that included criticism offered on the floor of Congress, contained in private letters, and any accounts offered by the press. The Federalists were so concerned that they would lose public support that they lashed out and tried to suppress all speech with any tendency toward increasing dissatisfaction with the government.

In advocating the adoption of the Sedition Act, the Federalists perceived themselves as champions of liberty. At face value, they believed that the Sedition Act was necessary to protect the republic by preserving the good reputation of the nation's leaders.[53] Moreover, they believed that the Sedition Act codified a reconceptualization of seditious libel. In defending the Act the Federalists argued that it incorporated many of the procedural protections that colonial publisher John Peter Zenger had attempted to invoke in his defense during his trial for libel in 1735.[54] "A jury is to try the

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[52]See James Morton Smith, Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties (Ithaca: Cornell University Press, 1966), p. 151.

[53]See Alexander Addison, Liberty of Speech and of the Press (Washington, Pa.: Loring Andrews, 1798), p. 20.

[54]See The Trial of John Peter Zenger, 17 Howell's State Trials 675 (1735); Livingston Rutherford, John Peter Zenger, His Press, His Trial and a

offence," Robert Goodloe Harper proclaimed, "and they must determine, from the evidence and circumstances of the case, first that the publication is *false*, secondly that it is *scandalous*, thirdly that it is *malicious*, and fourthly that it was made with the *intent* to do some one of the things particularly described in the bill."[55] Should the prosecution fail to sustain any of these points "the man must be acquitted."[56] Barring all else, Harper concluded, "it is expressly provided that he may give the truth of the publication as a justification."[57] Given the need for such legislation and the procedural protections provided in the Act, Harper concluded the legislative debate by arguing that the bill would be "an important means of preserving the Constitution."[58]

As one would expect, opponents who questioned the leadership or policies of the Federalist's was compelled to speak out against the Sedition Act. Led by Nathaniel Macon of North Carolina and Albert Gallatin of Pennsylvania, the Republicans mounted a vicious attack on the merit and constitutionality of the Act. The nature of this opposition, however, has been the source of considerable historical controversy. Despite their vehement opposition to the Sedition Act, the Republicans were simply outnumbered.

Bibliography of Zenger Imprints (New York, 1904); Leonard Levy, "Did the Zenger Case Really Matter?" William and Mary Quarterly, 3rd ser., 17 (1960): 35-50; Paul Finkleman, "The Zenger Case: Prototype of a Political Trial," in American Political Trials, ed. Michael Belknap (Westport, Conn.: Greenwood, 1981), pp. 21-42; and Leonard Levy, Freedom of the Press from Zenger to Jefferson (Indianapolis: Bobbs-Merrill, 1966), pp. 43-61.

[55]Harper, Annals of Congress, 10 July 1798, p. 2168. Emphasis in original.

[56]Harper, 10 July 1798, p. 2168.

[57]Harper, 10 July 1798, p. 2168.

[58]Harper, 10 July 1798, p. 2171.

In a series of votes, decided largely along party lines, the Sedition Act passed the Senate by a vote of eighteen to six on 5 July 1798 and passed the House by a vote of 44 to 41 on 10 July 1798.[59] Two days later Congress enacted a supplemental provision modifying the Sedition Act. This legislation empowered judges to require anyone who had been convicted to post bond prior to release at the completion of the sentence. This bond was forfeited if the individual continued to criticize the government, thereby creating an economic deterrent to speech critical of the government. The presiding judge was given complete discretion over the amount of the bond and the length it was binding.[60] President Adams signed the statute on 14 July 1798.

The adoption of the Sedition Act prompted widespread debate. A series of resolutions condemning and condoning the Acts were adopted by state legislatures.[61] The most famous of these resolutions, covertly authored by James Madison and Thomas Jefferson, were adopted by the outraged legislatures of Kentucky and Virginia.[62] The Kentucky and Virginia Resolutions contained a bitter attack on the constitutionality and the desirability of the Sedition Act. Ironically, Madison and Jefferson kept their

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[59]See Annals of Congress, 4 July 1798, p. 599; and 10 July 1798, p. 2171.

[60]See 1 United States Statutes at Large 596-597 (1798).

[61]See "The Kentucky and Virginia Resolutions of 1798," in Documents of American History, vol. 1., ed. Henry Steele Commager (New York: Appleton-Century-Crofts, 1958), pp. 178-183.

[62]See Adrienne Koch and Harry Ammon, "The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties," William and Mary Quarterly 5 (1948): 148. To put these dates into perspective, Madison's involvement was not made public until the year he became President of the United States. By the time Jefferson's involvement was public knowledge he was in his seventies.

involvement in drafting these resolutions secret for fear of being indicted under the very Act that they were protesting.[63] Although Republican strength was rising south of the Potomac, it was not yet strong enough to secure formal expressions of approval in other states for the Kentucky and Virginia Resolutions. The states north of the Potomac, firmly under Federalist control, emphatically denied the resolutions either by legislative reply or by enacting new state legislation restricting seditious expression.[64]

Even as the Congress and the various states debated the merits of the Sedition Act, the Federalists launched *common law proceedings* against two Republican newspapers. The Federalists singled out Benjamin Franklin Bache's Aurora, the leading Republican newspaper, and John Daly Burk's Time Piece, a thriving Republican journal. During his tenure at the Aurora, Bache had managed to alienate virtually every Federalist. As a defender of the French Revolution, he vigorously opposed Washington's foreign policy, and he had argued for a diplomatic response to the French problem. Bache's continued criticism culminated in his indictment on 26 June 1798 for libeling the President. Released on bail pending trial, he continued his critical stance. While on bail, Bache contracted yellow fever and died five days later before his case was tried.[65] Like Bache, Burk was indicted for libeling the President.

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[63]See Dumas Malone, Jefferson and the Ordeal of Liberty (Boston: Little, Brown, 1963), p. 400.

[64]See Frank Maloy Anderson, "Contemporary Opinions of the Virginia and Kentucky Resolutions," The American Historical Review 5 (1899-1900): 236-237; and James MacGregor Burns, The Vineyard of Liberty (New York: Knopf, 1982), p. 132.

[65]This account of Bache's common law prosecution is taken from Bernard Fay, The Two Franklins: Fathers of American Democracy (Boston: Little, Brown, 1933); Norman L. Rosenberg, Protecting the Best Men: An

Dr. James Smith, co-proprietor of the Time Piece, was arrested along with Burk and charged with defamatory libel on 6 July 1798. Also like Bache, Burk continued to publish his critical commentary while out on bail. The conciliatory Dr. Smith, however, soon became disenchanted with Burk and dissolved their partnership, thereby destroying the Time Piece. Eventually, Republican Aaron Burr managed to negotiate a deal by which Burk would be released in exchange for his pledge to leave the country. Upon his release, Burk went into hiding and reappeared in Virginia after Jefferson's election.[66] While the efforts against Bache and Burk did not result in convictions, it is important to understand the Federalists' motive in proceeding against these two publishers. Both Bache and Burk were singled out because they published prominent newspapers critical of the government.

When it was apparent that the Virginia and Kentucky Resolutions could not rally enough opposition to nullify the Sedition Act, the Federalists began prosecuting newspapers under the Act for seditious expression.[67] When the evidence seemed to warrant a charge, local Federalists proceeded to seek indictments. There is some ambiguity as to the actual number of individuals charged and convicted under the Sedition Act.[68] Anderson's

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Interpretive History of the Law of Libel (Chapel Hill: University of North Carolina Press, 1986), pp. 70-72; James Morton Smith, pp. 188-204; Miller, pp. 60-66; and Levy, Legacy of Suppression, p. 241.

[66]This account of Burk's common law prosecution is taken from Frank Maloy Anderson, "The Enforcement of the Alien and Sedition Laws," Annual Report of the American Historical Association for the Year 1912, p. 116; James Morton Smith, pp. 204-220; Miller, pp. 97-102; and Levy, Legacy of Suppression, p. 241.

[67]See Miller, pp. 72-73.

[68]In large part, this difficulty flows from the fact that only four trials were fully reported. Information on the other trials must come from newspapers,

survey, perhaps the most comprehensive, found 24 or 25 arrests, fifteen and possibly more indictments, ten trials and ten convictions.[69] Dorsen, Bender, and Neuborne identify twenty-five arrests, fifteen indictments, and ten convictions.[70] Mott and Emery both say there were fifteen indictments, eleven trials, and ten convictions under the Sedition Act.[71] Burns documents sixteen prosecutions and fifteen convictions.[72] Page Smith counts fourteen indictments under the Sedition Act and three more under the common law.[73]

While the Federalists obtained only a handful of indictments under the Sedition Act, it is important to consider three mitigating factors before dismissing the Sedition Act as an inconsequential episode in American history. First, and foremost, each of the prosecutions under the Sedition Act singled out a leading Republican editor or writer. Thus, while the aggregate number of cases might not be large, the impact of the Act should not be underestimated because of the prominence of the individuals indicted.

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letters, and other accounts of the events. The four trials that are fully reported are United States v. Lyon, Wharton's State Trials 333 (1800); United States v. Haswell, Wharton's State Trials 684 (1800); United States v. Cooper, Wharton's State Trials 659 (1800); and United States v. Callender, Wharton's State Trials 688 (1800).

[69]See Anderson, "Enforcement," p. 120.

[70]See Thomas Dorsen, Paul Bender, and Burt Neuborne, Emerson, Haber, and Dorsen's Political and Civil Rights in the United States, 4th ed., vol. 1 (Boston: Little, Brown, 1976), p. 27.

[71]See Frank Luther Mott, American Journalism (New York: Macmillan, 1962), p. 149; and Edwin Emery, The Press and America (Englewood Cliffs: Prentice Hall, 1962), p. 161.

[72]See Burns, p. 123.

[73]See Page Smith, pp. 185-186.

Second, the Federalists only brought one prosecution in the Republican-dominated southern states.[74] By concentrating all of the prosecutions in the predominantly Federalist northern states, the Federalists were able to protect their political power base from challenge. Finally, the Federalist's ability to invoke the Sedition Act was limited by a judicial system which was ill-equipped to handle a substantial number of cases. Since the Sedition Act was a federal law, prosecutions could only be initiated in federal court. At that time, each state had but one federal circuit or superior court. Moreover, each court was in session for only a portion of any year as the six justices of the United States Supreme Court presided over these lower federal courts. The structure of the federal court system, therefore, was a significant barrier to more widespread use of the Sedition Act.[75]

The Court's Use of History in Sullivan

The constitutional issues raised by the Alien and Sedition Acts never reached the Supreme Court of that era.[76] The Court nonetheless has often implied that the founders of the Republic would have rejected federal government restrictions on seditious libel. In Abrams v. United States, for example, Justices Holmes and Brandeis rejected the claim "that the First

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[74]The only prosecution in a southern state was brought personally by Supreme Court Justice Samuel Chase in Virginia. See United States v. Callender, Wharton's State Trials 688 (1800).

[75]See Miller, p. 138.

[76]See Thomas Dorsen, Paul Bender, and Burt Neuborne, Emerson, Haber and Dorsen's Political and Civil Rights in the United States, Vol. 1, 4th ed. (Boston: Little, Brown, 1976), p. 27.

Amendment left the common law as to seditious libel in force."[77] Justice Black claimed that American history was consistently against such a notion. At one point he noted that "there are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted."[78] In a later case, Justices Black and Douglas boldly concluded that "the First Amendment repudiated seditious libel for this country."[79] If this assertion is true, then the Court would have concluded that the Sedition Act was blatantly unconstitutional had it ever considered a case brought under the Act.

Indeed, several legal scholars seem to imply that the Sedition Act was immediately repudiated by the legal community. Schofield's famed essay on freedom of the press argues that the Constitution repudiated the English common law tradition of sanctioning seditious libel.[80] The legal reference treatise, American Jurisprudence, claims that the Sedition Act was

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[77] Abrams v. United States, 250 U.S. 616, 630 (1919). It seems that Holmes is closer to the mark twelve years earlier where he writes: "The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practised by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." Patterson v. Colorado, 205 U.S. U.S. 454, 462 (1907).

[78] Bridges v. California, 314 U.S. 252, 264 (1941).

[79] Beauharnais v. Illinois, 343 U.S. 250, 272 (1952).

[80] According to Schofield, the American Revolution was intended to abolish the English common law governing freedom of expression. He concluded that the First Amendment obliterated the English common-law test of bad tendency and adopted the truth standard on all matters of public concern. See Henry Schofield, "Freedom of the Press in the United States," Proceedings of the American Sociological Society 11 (1914): 67-116.

"vigorously attacked as unconstitutional."[81] Chafee, the foremost legal commentator on the First Amendment, claimed that the "First Amendment was written by men . . . who intended to wipe out the common law crime of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible in the United States of America."[82]

While such legal accounts are ideologically comforting, they are nonetheless largely inaccurate. Had the Supreme Court ruled on the Alien and Sedition Acts in 1798, there is reason to believe that the Court would have found the Act to be constitutional. Moreover, it is highly probable that the Act would have been found to be constitutional by Supreme Court until mid-way through the twentieth century. To believe that the Court would have done otherwise is wishful thinking. It was not until one hundred and sixty-three years after the Act had expired, that the Court held that the Alien and Sedition Acts were unconstitutional in its opinion striking down an Alabama law that imposed stiff fines on anyone who criticized the behavior of public officials.

Justice Brennan begins the majority opinion by arguing that government restrictions on seditious expression discourage speakers from making critical comments about government and its officials. He argues it was precisely this sort of seditious speech which the First Amendment was intended to protect. According to Brennan, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all

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[81] 70 American Jurisprudence 2d *Seditious Libel* 11 (1973).

[82] Zechariah Chafee, Jr., Free Speech in the United States (Cambridge: Harvard University Press, 1941), p. 21.

public institutions."[83] Brennan attempted to establish this claim by referring to a larger historical context in which, while he freely admitted that "the Sedition Act was never tested in Court," he claimed that the "attack upon its validity has carried the day in the court of history."[84] For example, Brennan made reference to the historical fact that founders of the Republic like Jefferson and Madison had "vigorously attacked" the Act as being "unconstitutional."[85] To support this point Brennan quoted from the Virginia Resolution which:

> resolved that it 'doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the 'Alien and Sedition Acts,' passed at the last session of Congress . . . . (The Sedition Act) exercises . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto--a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has even been justly deemed the only effectual guardian of every other right.[86]

Brennan went on to quote at length from the Report on the Virginia Resolution as further evidence that the Act was an unconstitutional limitation on expression. As conclusive evidence that the founding fathers opposed the Sedition Act, Brennan observed that "Jefferson, as President, pardoned those who had been convicted and sentenced under the Act and

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[83] New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964), quoting Bridges v. California, 314 U.S. 252, 270 (1941).

[84] New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[85] New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964).

[86] New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964).

remitted their fines," declaring: "I discharge every person under punishment or prosecution under the sedition law, because I considered and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image."[87] The opinion went on to note that "fines levied in its prosecution were repaid by Congress on the ground that it was unconstitutional."[88]

Having established that the framers of the Constitution believed the Alien and Sedition Acts were unconstitutional, Brennan observed that the "invalidity of the Act has also been assumed by Justices of this Court."[89] To support this sweeping generalization Brennan referred to dissenting opinions by Justices Holmes and Brandeis in Abrams,[90] and Justice Jackson in Beauharnais.[91] In Abrams, Holmes and Brandeis had specifically rejected the claim that the First Amendment left the common law as to seditious libel in force.[92] Jackson's dissent in Beauharnais had argued that "criminal libel laws are consistent with the concept of ordered liberty only when applied with safeguards evolved to prevent their invasion of freedom of expression."[93] The fact that previous decisions had assumed the was law unconstitutional

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[87]New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[88]New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[89]New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

[90]See Abrams v. United States, 250 U.S. 616, 630 (1919).

[91]See Beauharnais v. Illinois, 343 U.S. 250, 288-289 (1952).

[92]Abrams v. United States, 250 U.S. 616, 630 (1919).

[93]Beauharnais v. Illinois, 343 U.S. 250, 295 (1952).

was proof enough, in Brennan's reasoning, that the Court would surely have ruled the law unconstitutional if they had reviewed it. By referring to the founding fathers and judicial history, Brennan tries to demonstrate that the "court of history" established that the Alien and Sedition Acts were unconstitutional. And since the Alien and Sedition Acts were unconstitutional, the Alabama law at issue in New York Times Co. v. Sullivan was also necessarily unconstitutional.

A Critique of Brennan's Historical Perspective

Justice Brennan's majority opinion in New York Times Co. v. Sullivan tries to create the impression that the Court would have declared the Sedition Act unconstitutional had it ever been reviewed. Although it is impossible to prove, there is reason to believe that the Court would have upheld the constitutionality of the Act. The Sedition Act was upheld by the lower federal courts and by three Supreme Court justices presiding over circuit courts.[94] Given the fact that three of the seven justices upheld the act, and given that all of the Justices had been appointed by Federalist presidents, it seems likely that the Supreme Court would have upheld the validity of the Sedition Act.[95] Indeed, the Court accepted more stringent limitations on expression.[96]

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[94]These decisions relied on a "bad tendency" doctrine which allowed the suppression of speech that could lead to an undesirable end. See Dorsen, Bender, and Neuborne, p. 27.

[95]There is no judicial record of any of the Justices being consistently opposed to the application of a federal common law in seditious libel prosecutions.

[96]For example, the "clear and present danger" test constructed to determine the constitutionality of restrictions under the Espionage and Smith Acts could have been cited as a precedent to uphold the constitutionality of the Alien and Sedition Acts. See for example Schenck v. United States, 249 U.S. 47

Regardless of Brennan's mistaken "postdiction" regarding what the court of 1798 might have ruled, a close examination of his argument reveals that Brennan's reasoning is suspect. While the Court is correct to say that Jefferson and Madison objected to the law, the analysis is incomplete for it does not acknowledge that the founders of the Republic supported state regulation of seditious libel.[97] The Court incorrectly represents the partiality of their reading of history. Given the facts of the case at bar, this could be a decisive error. Since the law being tested in Sullivan was an Alabama state law, it seems likely that the law would have been upheld by justices representing the legal and political values of the early 19th century. One could make a strong case, for example, that Jefferson and Madison would have supported the constitutionality of the Alabama law, if only because it was consistent with the state laws defended by the Virginia and Kentucky Resolutions and with the New York law used to convict Croswell. The same criticism could be advanced against the Court's claim that Jefferson suspended prosecutions, released those imprisoned, and repaid fines.[98] While it is true that Jefferson did terminate Sedition Act prosecutions, he also initiated some prosecutions at the state level. Such behavior hardly proves that he believed in a right of political criticism. Rather, it suggests that he only found the Sedition Act offensive because it was a federal law.

(1919); Debs v. United States, 249 U.S. 211 (1919); and Abrams v. United States, 250 U.S. 616 (1919).

[97]See William T. Mayton, "Seditious Libel and the Lost Guarantee of a Freedom of Expression," Columbia Law Review 84 (1984): 141.

[98]"Contrary to secondary sources, the Republican-dominated Congress during Jefferson's terms never made a general refund of fines to victims of the sedition law." Stevens, p. 225.

The overriding error in Brennan's reasoning is not that he misrepresents historical events, but that he closes the circle of historical interpretation into a logical tautology, always subject to refutation precisely because it begs the question at bar. Brennan first injects a modern conception of his understanding of a previous era. He then brings this necessarily confused interpretation back to the present as proof of what he had already decided to do about the Alabama law. Brennan's decision was arbitrary, and his proofs supports this predisposition. He takes little from the facts of the Alabama case, and what he takes from history is nothing but a form from which to hang his personal prejudices.

Early American law drew heavily on English common law, which recognized no right to criticize the monarch. Such seditious expression was first prohibited in Great Britain by statute in 1275, when Parliament made it illegal to communicate "any false news or tales whereby discord of occasion or discord of slander may grow between the king and his people or the great men of the realm."[99] This statute was reenacted in 1379 to prevent the "subversion and destruction" of the realm.[100]

While such measures may seem extreme, it should be remembered that England had a very different conception of government in that era than at present. In modern England the royalty is largely symbolic and the English Parliament derives its power from the people. Simply put, the people delegate some of their power to Parliament so that the government can function. However, in pre-nineteenth century England, a very different set of

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[99]G. D. Nokes, A History of the Crime of Blasphemy (London: Sweet and Maxwell, 1928), p. 51.

[100]Levy, Legacy of Suppression, p. 7.

principles were in operation. The King was seen as a divine ruler. The monarch's power came not from the people, but from God. According to Filmer's Patriarcha, since the power of Kings "is by the law of God . . . it hath no inferior law to limit it. The Father of a family governs by no other law than by his own will, not by the laws or wills of his sons or servants."[101] Under such a conception of government, the people had no claim on the monarch. Moreover, to criticize the monarch was to criticize God. In the words of James I, "as to dispute what God may do is blasphemy . . . . so it is sedition in subjects to dispute what a King may do in the height of his power."[102] Given this conception of the King, it is not surprising that such criticism was not tolerated, as is evidenced by the early English laws against seditious expression.

During this era the printing press was viewed primarily as a means by which seditious expression might be more widely disseminated. As a means to control the press the Crown claimed a royal prerogative to regulate all printing. A system was developed in which individuals had to submit a manuscript to the government for review prior to publication. Only after the government had purged objectionable material was a license granted to publish the work. Anything published without an official imprimatur was criminal expression. At the height of its infamy this system was composed of three independent but reinforcing agents. The Court of the High Commission was charged with the actual review and licensing of

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[101]Sir Robert Filmer, Patriarcha and Other Political Works of Sir Robert Filmer, ed. Peter Laslett (1949; reprint, New York: Garland, 1984), p. 96.

[102]James Stuart, "The State of Monarchy and the Divine Right of Kings," Whitehall, March 21, 1609, in British Orations from Ethelbert to Churchill (London: Dent, 1915), pp. 20-21.

publications. The Stationers Company, a group of printers, was granted a government monopoly over all printing. For enforcement the system relied on the Court of the Star Chamber, so named because it met in a room decorated with stars. The Star Chamber was especially infamous because it usually tried and convicted without a jury. Torture was used to extract confessions and those who confessed to sedition were often sentenced to death.

While the Star Chamber was eventually abolished by the Long Parliament in 1641, the individual speaker was still without any substantive protection. The government used seditious libel prosecutions in the common law courts as a means to control the press. According to Siebert, "convictions for seditious libel ran into the hundreds" in both the seventeenth and eighteenth centuries.[103] Even if an individual was not convicted, the threat of prosecution served as a potent deterrent to critical expression.[104] In developing such cases the secretary of state had the authority to issue general warrants authorizing office searches. The attorney general could use bills of information to circumvent the grand jury proceeding. When an individual was charged with seditious libel, the truth of his or her expression could not be used as a defense. Moreover, at the trial the jury was charged with determining only the facts of publication. The trial judge, who was appointed by the Crown, had the authority to determine the dangerousness of the publication, answer all questions of law, and then

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[103]Fredrick S. Siebert, Freedom of the Press in England: 1476-1776 (Urbana: University of Illinois Press, 1964), p. 365.

[104]See Levy, Legacy of Suppression, p. 13.

determine the appropriate penalty.[105] Throughout this period, Sir James Fitzjames Stephen has observed that the practical enforcement of the laws of seditious libel in England "was wholly inconsistent with any serious public discussion of political affairs."[106]

English political thought, even in the age of the Puritan Revolution, recognized only a very limited conception of freedom of speech. This is exemplified in the political philosophy of John Milton and John Locke. While many contemporary scholars have read Milton's Areopagitica as a bold libertarian statement, in reality Milton's argument was against prior restraint and not post publication prosecution. In his words, "those which otherwise come forth, if they be found mischievous and libelous, the fire and the executioner will be the timeliest and the most effectual remedy that man's prevent can use."[107] In all likelihood, Milton would have allowed the state to repress speech that challenged the common good. Most notably, Milton would have suppressed the speech of Catholics since their speech challenged conventional religious beliefs. Milton also would have allowed the state to treat seditious expression as a capital crime.[108]

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[105]See Thomas L. Tedford, Freedom of Speech in the United States (New York: Random House, 1985), pp. 16-17; and Levy, Legacy of Suppression, pp. 12-13.

[106]Sir James Fitzjames Stephen, A History of the Criminal Law of England, vol. 2 (London, 1883), p. 348.

[107]John Milton, Areopagitica, in Great Books of the Western World, ed. Robert Maynard Hutchins, vol. 32, John Milton (Chicago: Encyclopedia Britannica, 1952), p. 412.

[108]In fact, Milton served for a time as an official government censor. He defended this as consistent with the stance taken in Areopagitica by arguing that he was unwilling to extend any protection to printing on contemporary

Locke's Essay Concerning Human Understanding is often praised as a libertarian statement in defense of freedom of expression.[109] But upon closer examination it suffers from similar limitations. While Locke recognized that a diversity of opinions was necessary to arrive at the truth, he was unwilling to extend protection to all opinions. Instead, Locke believed that certain expression could be suppressed if it failed to add to human understanding.[110] At best, this works out to be a claim for academic freedom. In the practical world, Locke would have allowed the suppression of all speech which challenged existing religious and political norms--unless of course, seditionists were successful in an appeal to God through that trial-by-combat we have come to call "revolution." In A Letter Concerning Toleration, Locke warned that "no opinions contrary to human Society, or to those moral Rules which are necessary to the preservation of Civil Society, are to be tolerated by the Magistrate."[111] But perhaps the most instructive indictment of Locke's position can be found in his opposition to licensing laws: While Milton

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events. William M. Clyde, The Struggle for Freedom of the Press from Caxton to Cromwell (1934; reprint, New York: Franklin, 1970), pp. 172-173.

[109]See John Locke, Essay Concerning Human Understanding, in Great Books of the Western World, ed. Robert Maynard Hutchins, vol. 35, Locke-Berkeley-Hume (Chicago: Encyclopedia Britannica, 1952), p. 412.

[110]While Locke saw expression as a means to knowledge, he also realized that certain expression failed to contribute to knowledge. Maurice Cranston, John Locke (London: Longmans, Green, 1961), pp. 19-28.

[111]John Locke, A Letter Concerning Toleration (1689; reprint, Indianapolis: Hackett, 1983), p. 49.

objected in principle, Locke objected on purely economic grounds, fearful that the state would lose an important source of revenue.[112]

Taken together, the works of Milton and Locke reflect a surprising lack of commitment to unfettered political expression. They are primarily concerned with the prevailing system for licensing publication. Milton worries that such a system limits expression, and Locke complains that licensing has created a monopoly to the economic detriment of the people. But despite this opposition to licensing, neither of these political thinkers is committed to any concept of protecting expression. In particular, both are willing to sanction the suppression of significant segments of unpopular thought.

While this may seem like an extremely narrow conception of freedom of expression, it was not until 1689 that the English Bill of Rights even recognized a legislative privilege for members of Parliament.[113] Indeed, the very phrase "freedom of speech" in this age referred to a parliamentary and not a civil right.[114] In this era the individual citizen spoke entirely at his/her own risk. Even the demise of licensing in 1694 did not protect speech. While an individual could publish without government approval, they could be prosecuted after publication if the government disapproved of the publication's content.

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[112]See John Locke, The Philosophy of John Locke, ed. Peter Lord King (1884; reprint, New York: Garland, 1984), pp. 204-205.

[113]See Siebert, pp. 275-276.

[114]See J. E. Neale, "The Commons' Privilege of Free Speech in Parliament," in Tudor Studies, ed. R.W. Seton-Watson (London: Longmans, Green, 1924), pp. 257-286; and Harold Hulme, "The Winning of Freedom of Speech by the House of Commons," American Historical Review 61 (July 1956): 825-853.

It was not until the end of the eighteenth century that even a limited right of freedom of speech developed. In 1792, the legislators approved Fox's Libel Act, which established truth as a defense and charged the jury instead of the judge with determining whether the material was seditious. While this made conviction more difficult, the government still used prosecutions to control the press. The jury only protected expression when public opinion ran against the government. In the three decades immediately prior to the adoption of the First Amendment in America, the English government initiated seventy sedition prosecutions resulting in fifty convictions.[115] Such prosecutions were common until the passage of the Reform Bill of 1832.[116]

This English tradition must be taken into account when one assesses the constitutionality of the Alien and Sedition Acts. The common law concept of freedom of speech was simply the absence of prior restraint. But while the absence of prior restraint meant that an individual could publish whatever he or she wished, punishment after the fact was permissible. In the words of Blackstone,

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press: but if he publishes what is

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[115]See Dorsen, Bender, and Neuborne, p. 21. These prosecutions included John Wilkes and the publishers of Junius' Letter to the King.

[116]See Chafee, Free Speech in the United States, p. 27.

> improper, mischievous, or illegal, he must take the consequences of his own temerity . . . .[117]

Such a conception of free press allowed individuals to speak freely only at their own risk and the discretion of the government.

This interpretation of the English common law of seditious libel was adopted in America. At first, the English used the doctrine of seditious libel against Americans who were critical of the Crown. Perhaps the most famous of these attempts was the trial of newspaper publisher John Peter Zenger in New York in 1735 for printing attacks on representatives of the King. Zenger had criticized British Governor Cosby for being both incompetent and corrupt. Among the key elements in the case is that the trial judge instructed the jury only to consider the facts of publication. The judge claimed that he alone would determine whether or not the material was seditious. Fortunately for Zenger, the jury ignored the judge's instructions and accepted Andrew Hamilton's argument that truth was a defense and voted for acquittal.[118] This outcome notwithstanding, the prevailing law of the land was the English common law. Had Zenger attacked the popular New York Assembly instead of the unpopular royal governor, it is likely that he would have been convicted.

The Zenger prosecution was not an isolated occurrence. Most of the American colonies had laws against seditious libel in effect throughout this period. Levy identifies a host of prosecutions for seditious expression

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[117]William Blackstone, Commentaries on the Laws of England, Vol. 4 (Chicago: University of Chicago Press, 1979), pp. 151-152.

[118]See The Trial of John Peter Zenger, 17 Howell's State Trials 675 (1735).

initiated against revolutionary critics of England.[119] Even after the American revolution, the seditious libel doctrine was used to silence critics of the fledgling American government. Smith cites the trial of Congressman Samuel Cabell for seditious libel in 1798, and prosecutions against Benjamin Bache and John Daly Burke in 1798 prior to the passage of the Sedition Act.[120] Commenting on precisely this period, Levy concludes that "freedom of speech and press was so little known that even libertarian theory regarded the right to express seditious sentiments as an intolerable indulgence in licentiousness."[121]

When considered against this background, there is good reason to believe that the Supreme Court may have upheld the constitutionality of the Sedition Act. There was a long and established tradition of seditious libel prosecutions. At best, the common law tradition was only beginning to recognize certain procedural guarantees, as evidenced by Fox's Libel Law. Thus, while there was some impetus toward increased protection for expression, there was no recognized right to criticize the government. The common law tradition grew to afford the critic a right to a jury trial and a truth defense. The Sedition Act of 1798 was consistent with this tradition.[122]

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[119]See Levy, Emergence of a Free Press, pp. 16-88.

[120]See Smith, pp. 95, 183-184, and 188-220.

[121]Levy, Legacy of Suppression, p. 17.

[122]Taking this reasoning to the extreme, Nelson has gone so far as to wonder if the Sedition Act was really necessary given the ability of common law remedies. Harold L. Nelson, "Review of Legacy of Suppression," Journalism Quarterly 38 (1961): 96.

While we may wish that our founding fathers had a more liberal conception of free speech, there is little to suggest that they had moved significantly away from the common law by 1798. The evidence in the years from 1776 to the adoption of the Sedition Act seems to suggest that our founding fathers were hardly as committed to free expression as the modern Court suggests in Sullivan. Thus, despite Brennan's masterful use of rhetoric in drafting the majority opinion, there is reason to believe that the Supreme Court would have upheld convictions brought under the Sedition Act.[123] The Court had a long history of tolerating the suppression of seditious expression. In addition, such suppression was consistent with the prevailing common law tradition in operation at that time.

The Sullivan court's reading of events turns the traditional legal account on its head. Rather than being a force defending the right to seditious expression, the Court historically has functioned as a tool of repression. In the early years of the Republic, the Court simply ignored government efforts to repress seditious expression. In the early twentieth century, the Court invoked the phrase "clear and present danger" to justify the repression of such speech. It is only in the past three decades that the Court has begun to extend constitutional protection to speech critical of the government. This change was prompted by the Court's subtle alteration in the application of "clear and present danger" test, thereby creating a more rigorous test. The Court has now overcome its own legacy and simply declared that seditious libel has always been protected. In the end, the Court has arrived at the

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[123]See for example, Thomas F. Carroll, "Freedom of Speech and of the Press in the Federalist Period: The Sedition Act," Michigan Law Review 18 (1920): 615-651.

principle that seditious libel should be protected unless it is intended to, and successful in, instigating imminent lawless action. The perspective is not an initial premise that the Court has steadfastly applied throughout American history, but rather a conclusion that the Court has arrived at relatively recently.

The Judicial System and the Libertarian Legacy of Sullivan

That the contemporary Supreme Court makes significant constitutional claims by presuming how previous Courts would have interpreted the same issues has two important implications within the context of the debate on seditious libel. First, it demonstrates that the Court has not been the great champion of First Amendment rights that it is purported to be. Second, it illustrates how the judicial system is able to construct constitutional fights *de novo*. Indeed, a detailed account of the Court's treatment of seditious libel reveals that the Court can hardly be praised for leading the nation to a new understanding of constitutional rights. Despite the portentous tone of the opinions of the Court, it is not readily apparent that any substantial threats to an open society were present in the earlier sedition cases that were upheld, or that the legal rules devised by the Court in those cases could have had any useful systemic consequences even if such threats had been present. neither judicial review, nor the judicial system itself, addresses the causes of intolerance and censorship, nor do they constitute an effective check on legislative or public repression. The judicial system does not, and cannot, operate independently from its historical milieu.

Such a conclusion directly challenges the traditional role of protector of rights commonly ascribed to the Court. With respect to the First Amendment, this role has been championed by numerous commentators.[124] Chafee believed that the Court could broadly interpret the First Amendment to protect speech.[125] Emerson has argued that "we have come to depend upon legal institutions and legal doctrines as a major technique for maintaining our system of free expression."[126] Commager claims that the Court could play "an active, even a decisive, part in the preservation of liberty."[127] Blasi has argued that the courts can protect the First Amendment during pathological periods during which the tendency toward suppression is pronounced.[128] Indeed, Baum has gone so far as to conclude that "the Court has been far more supportive of the First Amendment rights than the other branches of government, whose policies frequently have been antagonistic to these rights."[129] Even those who recognize the Court's erratic record on free

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[124]See for example Archibald Cox, The Role of the Supreme Court in American Government (New York: Oxford University Press, 1976); Lawrence Baum, The Supreme Court (Washington: Congressional Quarterly, 1985); and Henry J. Abraham, Freedom and the Court: Civil Rights and Liberties in the United States, 4th ed. (New York: Oxford University Press, 1982).

[125]See Chafee, "Freedom of Speech in War Time," pp. 959-960.

[126]Emerson, p. 5.

[127]Henry Steele Commager, Freedom and Order: A Commentary on the American Political Scene (New York: Braziller, 1966), pp. 25-29.

[128]Vincent Blasi, "The Pathological Perspective and the First Amendment," Columbia Law Review 85 (1985): 449-514.

[129]Baum, p. 69. See also Learned Hand, The Bill of Rights (Cambridge: Harvard University Press, 1958), p. 69.

speech have been quick to offer a defense for its actions. Bork claims that the Court has made fundamental errors in interpreting the First Amendment and then goes on to assign the courts the responsibility of protecting the public's "freedom to discuss government and its policies."[130] Abraham worries that the Court may not have done enough to protect "The Precious Freedom of Expression," yet concludes that "in the final analysis we must confidently look to the Court to draw a line based on constitutional common sense."[131] Cox summarily dismisses decisions restricting First Amendment freedoms as "minor blemishes."[132]

A more accurate conclusion would be that the Court historically has done little to protect speech and has only gradually come to afford protection to First Amendment freedoms. It was not until 1964, and a case involving an attack on a public person by The New York Times, that the Court finally declared that the Alien and Sedition Acts were unconstitutional. The Alien and Sedition Acts posed a difficult problem for the Court as there was no convenient way to reconcile the conspicuous non-decision regarding the Alien and Sedition Acts with decisions protecting seditious libel. To overcome this deficiency, Justice Brennan simply created a fictional account of legal history. In Brennan's account the founders of the Republic and framers of the Constitution created a right to criticize the government; popular champions such as Jefferson and Madison zealously protected free and robust political debate against legislative excess; and the Court

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[130]Robert N. Bork, "Neutral Principles and Some First Amendment Problems," Indiana Law Journal 47 (1971): 23.

[131]Abraham, p. 219.

[132]Cox, p. 49.

righteously protected the integrity of this commitment. The result is Brennan's "beautiful lie;" a rhetorical fiction that creates a desired and desirable reality which could not otherwise exist. By an objective standard, such as consistency with the documentary evidence, the lie fails badly. Yet, in this instance "false" history serves Brennan well as it squares the past with the present, provides a perfect warrant for dismissing an Alabama law repressing speech, and allows punishment for seditious libel to be declared unconstitutional. That this is a "beautiful" lie has been persuasively demonstrated in that the Sullivan decision has been used as a key premise in several decisions expanding protection for freedom of speech.

In the end, however, the chief criticism of Brennan's opinion and the libertarian legacy of Sullivan is that both are based upon a false history. In breaking away from old legal formulas, Brennan manufactured a history of seditious libel that suited his own predispositions and he used this manufactured history as the basis for expanding protection provided to the media in libel cases. Subsequent Court decisions have employed the language and history of Sullivan as the rationale for their decisions. Yet, the warrant for expanding protection of the media should not be based upon a historical interpretation that is so conspicuously at odds with widely-accepted facts and vulnerable to attack by critics of open expression. Instead, a more useful justification, or warrant, for allowing a wide latitude if criticism of government and public officials should be based upon the social functions of speech in a free society and our philosophical commitment to promoting a genuine marketplace of ideas.